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APPLE INC.

14 UNITED STATES DISTRICT COURT  
15 NORTHERN DISTRICT OF CALIFORNIA  
16 SAN FRANCISCO DIVISION

18 AYLUS NETWORKS, INC.,  
19 Plaintiff,  
20 v.  
21 APPLE INC.,  
22 Defendant.

CASE NO. 3:13-cv-04700-EMC

**APPLE INC.'S NOTICE OF MOTION AND  
MOTION TO DISMISS AYLUS'S FIRST  
AMENDED COMPLAINT FOR FAILURE  
TO STATE A CLAIM, OR, IN THE  
ALTERNATIVE, MOTION FOR A MORE  
DEFINITE STATEMENT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF**

Hearing Date: March 20, 2014  
Time: 1:30 p.m.  
Dept: Courtroom 5 – 17th Floor

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1 **NOTICE OF MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD: PLEASE TAKE  
3 NOTICE that on March 20, 2014 at 1:30 p.m., or as soon thereafter as this matter may be heard,  
4 in Courtroom 5, of this Court, located at 450 Golden Gate Avenue, 17th floor, San Francisco, CA  
5 94102, Defendant Apple Inc. (“Apple”), will move for an order dismissing Plaintiff’s willfulness  
6 allegations in its First Amended Complaint under Federal Rule of Civil Procedure 12(b)(6) for  
7 failure to state a claim, or in the alternative, for a more definite statement pursuant to Federal  
8 Rule of Civil Procedure 12(e).

9 This motion is made pursuant to Rules 8, 12(b)(6) and 12(e) of the Federal Rules of Civil  
10 Procedure and is based on the grounds that the First Amended Complaint fails to state a claim for  
11 willful infringement upon which relief can be granted and fails to state facts sufficient to provide  
12 a statement showing Plaintiff is entitled to relief. Specifically, Plaintiff fails to plausibly plead a  
13 claim of willful infringement.

14 This motion is based on this Notice of Motion, the attached memorandum of points and  
15 authorities in support thereof, the pleadings and documents on file in this case, and such other  
16 evidence and argument as may be presented at the hearing on this motion.  
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1                   **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**  
2                   **OF APPLE INC.'S MOTION TO**  
3                   **DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT**

4           Defendant Apple moves this Court, pursuant to Federal Rule of Civil Procedure 12(b)(6),  
5           to dismiss the willful infringement allegations filed against it by Plaintiff Aylus Networks, Inc.  
6           ("Aylus") for failure to state a claim upon which relief can be granted. Alternatively, if the Court  
7           declines to dismiss Aylus's willful infringement claims, Apple seeks a more definite statement of  
8           these claims, pursuant to Federal Rule of Civil Procedure 12(e).

9                   **STATEMENT OF ISSUES TO BE DECIDED**

10          Should Plaintiff Aylus's claim of willful infringement be dismissed under Rule 12(b)(6)  
11          because it fails to properly plead the required elements of willful infringement or, in the  
12          alternative, should Aylus be required to provide a more definite statement as to its willful  
13          infringement allegations pursuant to Rule 12(e)?

14          **I.       INTRODUCTION**

15          Aylus's First Amended Complaint fails to meet the pleading standards articulated by the  
16          Supreme Court in *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal* with respect to Aylus's willful  
17          infringement allegations. Indeed, Aylus fails to satisfy any of the pleading requirements regarding  
18          its allegations of willful infringement because Aylus's First Amended Complaint does not allege  
19          the necessary facts of the required elements of a willfulness claim.

20          Aylus's pleading deficiency also masks a greater, fundamental problem— Aylus had no  
21          good-faith basis to plead willful infringement prior to the filing of its original complaint. Claims  
22          of willful infringement require, at a minimum, that the defendant has knowledge of the patent-in-  
23          suit and infringement prior to filing the lawsuit. Aylus did not plead any facts sufficient to  
24          establish pre-filing knowledge by Apple.

25          As such, Aylus's willful infringement claim is ripe for dismissal. Apple respectfully  
26          requests that the Court dismiss Aylus's willful infringement claim pursuant to Federal Rule of  
27          Civil Procedure 12(b)(6). In the alternative, Apple requests that Aylus be ordered to provide a  
28          more definite statement of these claims under Federal Rule of Civil Procedure 12(e). The willful  
29          infringement allegations are so vague and conclusory as to prevent Apple from preparing a

1 meaningful defense.

## 2 **II. STATEMENT OF FACTS**

3 On October 9, 2013, Aylus filed a complaint (the “Complaint”) against Apple alleging  
4 infringement of U.S. Patent No. RE 44,412 (the “’412 patent”). Dkt. No. 1. On January 6, 2014,  
5 Apple filed an answer denying the material allegations of the Complaint and asserting a number  
6 of affirmative defenses. Dkt. No. 20.

7 On January 27, 2014, Aylus filed a First Amended Complaint (“First Amended  
8 Complaint”) that is the subject of this motion. Dkt. No. 26. That First Amended Complaint  
9 consists of the following allegations regarding Apple’s alleged willful infringement:

10 • “On information and belief, Apple monitors the issuance of patents in the field of  
11 the ’753/412 patent, and consequently, Apple has had knowledge of the ’753/412 patent since at  
12 least the time of the patent’s issue date.” Dkt. No. 26, ¶18.

13 • “On information and belief, Apple employee Rob Orgel has knowledge of the  
14 ’753/412 patent and/or patent application since at least June 2007. Mr. Orgel is an attorney who  
15 received his JD from Harvard Law school. From June 2007 through mid-2008, he was Aylus’  
16 Chief Operating Officer. Mr. Orgel has worked at Apple since January 2010.” Dkt. No. 26, ¶19.

17 • “Apple has knowledge of the ’753/412 patent since the date of the filing of this  
18 Complaint.” Dkt. No. 26, ¶20.

19 • Reference to a letter allegedly sent to Apple’s Senior Vice President and General  
20 Counsel on October 9, 2013, the same day that Aylus filed its original Complaint, claiming that  
21 Apple infringes the ’412 patent. Dkt. No. 26, ¶21.

22 In the fourth paragraph of Aylus’s Prayer for Relief, Aylus claims that it is entitled to  
23 additional damages. Dkt. No. 26, Prayer for Relief, ¶4.

## 24 **III. ARGUMENT**

### 25 **A. Aylus Fails To State A Plausible Claim Of Willful Infringement**

26 Aylus’s conclusory allegations of willful infringement fail to state a claim. To satisfy  
27 minimal pleading requirements, Aylus must plead “a short and plain statement of the claim  
28 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). “To survive a motion to

1 dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to  
2 relief that is plausible on its Complaint.’” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1940, (2009) (citing  
3 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); see *Tech. Licensing Corp. v.*  
4 *Technicolor USA, Inc.*, 2010 WL 4070208, at \*1 (E.D. Cal. Oct. 18, 2010) (quoting *Iqbal*, 129  
5 S.Ct. at 1940). “While legal conclusions can provide the framework of a complaint, they must be  
6 supported by factual allegations.” *Iqbal*, 129 S.Ct. at 1950. These *Iqbal/Twombly* pleading  
7 requirements apply to claims of willful infringement.

8 In order to establish willful infringement, Aylus must prove by clear and convincing  
9 evidence that Apple acted with “objective recklessness.” Not only must there be proof of an  
10 objectively high likelihood of infringement of a valid patent, but there must also be proof that this  
11 risk was either known, or so obvious that it should have been known, to the infringer. *In re*  
12 *Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (en banc). This “objective  
13 recklessness” must occur **before** the complaint is filed and an allegation of post-filing patent  
14 awareness is not sufficient to even state a claim for willfulness, let alone survive a motion to  
15 dismiss. See *EON Corp. IP Holdings, LLC, v. Sensus USA, Inc.*, 2012 WL 4514138, \*1 (N.D.  
16 Cal. Oct. 1, 2012) (citing *Seagate*, 497 F.3d at 1374).

17 A preliminary injunction generally provides an adequate remedy to combat an accused  
18 infringer’s post-filing willful infringement. *Seagate*, 497 F.3d at 1372. “A patentee who does  
19 not attempt to stop an accused infringer’s activities [by moving for a preliminary injunction]  
20 should not be allowed to accrue enhanced damages based solely on the infringer’s post-filing  
21 conduct.” *LML Holdings, Inc. v. Pac. Coast Distributing, Inc. et al.*, Case No. 11–CV–06173  
22 YGR, 2012 WL 1965878, \*5 (N.D. Cal. May 30, 2012).

23 To the extent that Aylus’s First Amended Complaint purports to assert a claim against  
24 Apple for willful infringement, that claim fails to state facts sufficient to show Plaintiff is entitled  
25 to relief. Here, Aylus fails to meet the pleading threshold because it only sets forth conclusory or  
26 legally insufficient allegations relating to its willful infringement claim, none of which state a  
27 plausible claim that Apple acted with objective recklessness.

28 First, Aylus’s allegation that Apple has had “knowledge of the ’753/412 patent since the

1 date of the filing of this Complaint” is legally insufficient on its face since mere allegations of  
2 post-filing knowledge are insufficient to plead willful infringement. Dkt. No. 26, ¶20; *EON*  
3 *Corp. IP Holdings, LLC*, 2012 WL 4514138, at \*1.

4 Second, Aylus alleges that it sent a letter to Apple’s Senior Vice President and General  
5 Counsel on October 9, 2013, claiming that Apple infringes the ’412 patent. Dkt. No. 26, ¶21.  
6 This too constitutes post-filing conduct that is insufficient to establish a claim for willful  
7 infringement because Aylus sent the letter to Apple the *same day* that it filed its original  
8 complaint in this case. Dkt. No. 26, ¶20; *see EON Corp. IP Holdings, LLC*, 2012 WL 4514138,  
9 at \*1.

10 Third, Aylus’s allegations that “[o]n information and belief, Apple monitors the issuance  
11 of patents in the field of the ’753/412 patent, and consequently, Apple has had knowledge of the  
12 ’753/412 patent since at least the time of the patent’s issue date” are far too conclusory to  
13 constitute a fact sufficient to show Aylus is entitled to relief under a claim for willful  
14 infringement. Dkt. No. 26, ¶18; *Iqbal*, 129 S.Ct. at 1950 (holding that unsupported legal  
15 conclusions are insufficient to defeat a motion to dismiss). Moreover, other district courts have  
16 held that such general accusations of knowledge of a patent are insufficient to “plausibly support  
17 the conclusion that [a defendant] ‘acted despite an objectively high likelihood that its actions  
18 constituted infringement of a valid patent,’ and that [defendant] knew or should have known that  
19 [its] actions constituted infringement of a valid patent.” *See MONEC Holding AG v. Motorola*  
20 *Mobility, Inc.*, 897 F. Supp. 2d 225, 236 (D. Del. 2012).

21 Fourth, Aylus alleges that Rob Orgel, a former Aylus employee and current Apple  
22 employee, had “knowledge of the ’753/412 patent and/or patent application since at least June  
23 2007.” Dkt. No. 26, ¶19. Aylus’s allegation that Mr. Orgel had knowledge of the ’412 patent or  
24 its reissuance predecessor patent, United States Patent No. 7,724,753 (the “’753 patent”), is  
25 demonstrably false because the ’753 patent issued on March 25, 2010 and the ’412 patent issued  
26 on August 6, 2013, both of which occurred *over two years* after Aylus Mr. Orgel had left Aylus.  
27 Dkt. No. 26, ¶11, 19. There is no supportable fact in Aylus’s First Amended Complaint that Mr.  
28 Orgel should have had knowledge of the issuance of the ’753 or ’412 patents long after he left

1 Aylus. Further, Aylus's allegation that Mr. Orgel was aware of the application that eventually  
2 became the '753/'412 patent fails because even if Mr. Orgel was aware of the patent application,  
3 the Federal Circuit has held that this knowledge alone is not enough to demonstrate willfulness.  
4 *State Indus., Inc. v. A.O. Smith Corp.*, 751 F.2d 1226, 1236 (Fed. Cir. 1985); *Conopco, Inc. v.*  
5 *May Department Stores Co.*, 46 F.3d 1556, 1562 (Fed. Cir. 1994); *Am. Original Corp. v. Jenkins*  
6 *Food Corp.*, 774 F.2d 459, 465 (Fed.Cir.1985); *LML Holdings, Inc.*, 2012 WL 1965878, at \*4  
7 (holding that "mere knowledge of patent applications, without more, does not allege an  
8 objectively high likelihood that Defendants' actions constitute infringement of a valid patent.")).  
9 Therefore, Aylus's allegations regarding Mr. Orgel, even if true, cannot satisfy the pleading  
10 requirements for alleging willful infringement.

11 Moreover, Aylus's willful infringement claim also fails because Aylus's First Amended  
12 Complaint seeks only a permanent injunction for Apple's alleged infringement and Aylus has not  
13 moved for a temporary restraining order or preliminary injunction against that alleged conduct,  
14 further demonstrating that Aylus's allegations are legally insufficient to establish a claim of  
15 willful infringement against Apple. *LML Holdings, Inc.*, 2012 WL 1965878, at \*5.

16 In sum, none of Aylus's alleged factual allegations that Apple engaged in willful  
17 infringement of the '412 patent are legally sufficient to state a claim for which relief can be  
18 granted and the Court should dismiss Aylus's willful infringement claims against Apple.

19 **B. In The Alternative, Aylus Should Be Required To Provide A More Definite**  
20 **Statement Of These Claims**

21 In the event the Court determines that Aylus's willful infringement allegations should not  
22 be dismissed, Apple requests, pursuant to Federal Rule of Civil Procedure 12(e), a more definite  
23 statement of Aylus's willful infringement allegations. "If a pleading fails to specify the  
24 allegations in a manner that provides sufficient notice, a defendant can move for a more definite  
25 statement under Rule 12(e) before responding." *Swierkiewicz v. Sorema NA.*, 534 U.S. 506, 514  
26 (2002).

27 Here, the willful infringement allegations fail to plead the requisite elements of willful  
28 infringement. The willfulness infringement allegations are so vague and conclusory as to prevent

1 Apple from preparing a responsive pleading and a meaningful defense. *See Patent Category*  
2 *Corp. v. Worldwide Creations*, 2007 WL 2667428, \*\*3-4 (C.D. Cal. May 7, 2007) (granting a  
3 motion for a more definite statement where the allegations lacked the necessary detail).  
4 Accordingly, Aylus should, at a minimum, be ordered to provide a more definite statement of its  
5 willful infringement claims.

6 **IV. CONCLUSION**

7 For all the reasons set forth above, Apple respectfully submits that the allegations of  
8 willful infringement in Aylus's First Amended Complaint be dismissed under Rule 12(b)(6) for  
9 failure to state a claim. Alternatively, the Court should require Aylus to provide a sufficiently  
10 definite statement of the willful infringement claims so that Apple can prepare a response and  
11 meaningful defense.

12 Dated: February 13, 2014

DLA PIPER LLP (US)

13  
14 By: /s/ Mark D. Fowler

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